Supreme Court, U.S.
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No.96-669

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOHNNY DUPREE, ET AL.,

Appellants,

v.

MIKE MOORE, ET AL,

Appellees.

On Appeal from the United States District Court for the Southern District of Mississippi

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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1. To the extent the District Court's order is an attempt to stay its own judgment, the District Court lacked jurisdiction to do so. Appellees mischaracterize Appellants' position regarding this issue. At no time have Appellants argued that appellate leave was necessary for Appellees to file their "Motion for Emergency Stay" by which they sought to delay implementation of the District Court's injunction against enforcement of the voting change effected by the repeal of Miss. Code Ann. § 37-7-611. Appellants argued below that the District Court had no authority to stay its judgment after this Court issued its certified judgment.

On appeal, Appellees attempt to distinguish the authorities cited by Appellants based on the fact that they dealt with this Court's certiorari jurisdiction rather than its appeal jurisdiction. Appellees do not, however, argue that the inability of a district court to stay its own judgment after issuance of the appellate mandate turns on whether the court's jurisdiction is appeal or certiorari; they merely point out that this case has not arisen by way of certiorari. This is a distinction without a difference. As the authorities cited in Appellants' main brief establish, a fundamental principle of jurisdiction is that a district court cannot stay its own judgment after the appellate court issues its mandate.

2. The parties agree that the District Court has authority under Fed. R. Civ. P. 60(b)(5) and (6) to modify an injunction. The parties disagree on whether the stringent standard for relief under Rule 60(b) has been met. Appellees argue that the court has "broad discretion" to modify the injunction "as it sees fit." (State/Forrest County Mot. p.7) Appellees fail, however, to dispute or even address the standard for modification stated in *Rufo vs. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992), and *United States vs. Swift & Co.*, 286 U.S. 106 (1932). *Rufo* holds that an order modifying an injunction requires "a significant change in circumstances" and that a modification cannot be based on events that were anticipated at the time of the original judgment. *Swift* teaches that a modification requires "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions."

Appellees do not deny that they have known of and fully understood the effect of § 37-7-611 since at least 1990, when this action was filed. They make no effort to explain how their understanding of the effect of this statute can be reconciled with *Rufo*. The Appellees also do not contest Appellants' position that the District Court's order is contrary to *Rufo*'s holding that modification of an injunction cannot perpetuate a constitutional violation.

Appellees' position is that significant changes support relief under Rule 60(b)(5). These changes are Mississippi's decision to seek preclearance after it lost *Dupree* and the timing of this Court's affirmance of the District Court's

holding that the repeal of Miss. Code Ann. § 37-7-611 had not been precleared. Appellees contend that a party's tactical litigation choices outweigh considerations of finality of judgments. As explained in Appellants' main brief, that position was rejected in *Ackermann vs. United States,* 340 U.S. 193 (1950). Adopting Appellees' position would encourage parties to forego exercising choices prior to the conclusion of a case in favor of seeking relief under Rule 60(b). That view is inconsistent with the purpose of Rule 60(b) and would result in more attempts to set aside or modify final judgments. In turn, litigation costs would increase, and an already crowded docket would become more congested.

Appellees' reliance on the timing of this Court's decision is simply a recognition that litigation is unpredictable and subject to unforeseen delays. In a Voting Rights Act case, this Court has answered the question of who should bear the burden of delays: "Congress expressly indicated its intention that the States and subdivisions, rather than citizens seeking to exercise their rights, bear the burden of delays in litigation." *Perkins vs. Mathews,* 400 U.S. 379, 396 (1971).

3. Although Appellees argue that "grave and irreparable injury ... would occur statewide if the school district boundaries were allowed to be moved before the imminent school year," they did not identify any other county in Mississippi in which changes would be carried out for the school year that began in August 1996. Only in the three school districts involved in *Dupree* were changes scheduled to take place for that school year. Appellees' position that the potential effect on school districts outweighs voting concerns is contrary to *Lopez vs. Monterey County,* 117 S.Ct. 340 (1996). There, this Court pointed out that enjoining an election held under an unprecleared plan would have left the jurisdiction without a judicial election system. This complication did not, however, "change the basic nature of the § 5 preclearance process." *Id.* at 348. Absent extreme and unanticipated circumstances not present here, "§ 5's prohibition against implementation of unprecleared changes *required* the District Court to enjoin" enforcement of the change. *Id.* at 347-48.

4. Appellees contend that the remedy remains an open question because the District Court has never issued an "appropriate" remedy. They do not address the effect of this Court's summary affirmance of the District Court's judgment, which enjoined the State from enforcing both the implicit and explicit repeal § 37-7-611. As explained in Appellants' main brief, a summary affirmance "without doubt reject[s] the specific challenges presented in the statement of jurisdiction" and disposes of the "precise issues presented and necessarily decided." *Mandel vs. Bradely,* 432 U.S. 173 (1977). An injunction against enforcement of the unprecleared statute is the appropriate remedy for a jurisdiction's failure to comply with the Voting Rights Act. The *Dupree* court issued an injunction. Therefore, the remedy issue has been decided.

Appellants urge that probable jurisdiction be noted.

Respectfully submitted,

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